Filed 9-29-84

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-465

DR. LEE ROY BLACK,
Director of the Missouri Department of
Corrections and Human Resources,

DICK D. MOORE,
Chairman, Missouri Board of Probation and Parole,

Petitioners,

v.

NICHOLAS JAMES ROMANO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Nicholas James Romano, respectfully requests that this Court deny the petition for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 735 F.2d 319 (8th Cir. 1984). The district court's opinion is reported at 567 F.Supp. 882 (E.D. Mo. 1983). These opinions are reproduced in the Appendix to the Petition for a Writ of Certiorari, No. 84-465, October Term, 1984.

JURISDICTION

On May 31, 1984, the Eighth Circuit affirmed the district court's order granting respondent's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The petition for rehearing was denied on June 28, 1984. This Court's jurisdiction is based on 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent has included quotations from the pertinent constitutional and statutory provisions in Appendix A. These provisions include the following:

1. United States Constitution, Amendment XIV;
2. 28 U.S.C. §2254(a)-(d);
3. 28 U.S.C. §2243; and
4. Mo. Rev. Stat. §549.111.1 (1963, as amended 1967) (repealed by L. 1977, p. 658, eff. January 1, 1979).

STATEMENT OF THE CASE

I. Procedural History

On December 10, 1974, respondent, Nicholas James Romano ("Romano"), was arrested for transferring and selling marijuana. Tr. at 6, 32.[1] On November 15, 1976, Romano entered guilty pleas before the Honorable Dean Whipple, 26th Judicial Circuit, Laclede County, Missouri to two counts of an indictment alleging that Romano transferred (Count I) and sold (Count II) marijuana. Tr. at 2, 3, 4. On April 13, 1977, Judge Whipple sentenced Romano to two concurrent twenty-year terms of imprisonment, but suspended execution of the sentence and placed Romano on probation for five years, the maximum term allowed under Missouri law. Tr. at 46, 53, 54.

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[1]The term "Tr." refers to the transcript of Romano's guilty plea, sentencing, and probation revocation hearings which was part of the record in the Eighth Circuit and district court below. The term "D.R." refers to the record, other than the transcript, which the parties designated in the Eighth Circuit. The term "Pet." refers to the Petition for a Writ of Certiorari No. 84-465, October Term, 1984. (The Clerk of this Court rejected and refused to docket petitioners' original petition for certiorari which respondent received on August 31, 1984. Respondent received a second petition on September 24, 1984. All page citations refer to this second petition.) The term "Br." refers to Romano's opening brief in the Eighth Circuit.

On June 15, 1977, Romano was arrested and charged with the felony of leaving the scene of an accident. On July 18, 1977, Judge Whipple held a probation revocation hearing in which he revoked Romano's probation and imposed a twenty year sentence for his underlying marijuana conviction. Tr. at 134 and Court's Memorandum of Findings: D.R. at 47-49.[2]

The State of Missouri filed a First Amended Information charging Romano with the misdemeanor of careless and reckless driving for his conduct arising out of the car accident on June 15, 1977. D.R. at 52. On October 12, 1977, Romano pleaded not guilty to the careless and reckless driving charge, but the court found Romano guilty and fined him $100.00 and costs. D.R. at 53.

In an effort to obtain post-conviction relief, on March 28, 1980, Romano, representing himself pro se, filed a motion in the Circuit Court of Laclede County, Missouri, pursuant to Mo. S. Ct. Rule 27.26, seeking to challenge the constitutionality of his probation revocation proceeding. See appropriate docket sheet entries, D.R. at 54-57. On July 11, 1980, Judge Whipple denied Romano's petition based on Missouri law which holds Romano's proper procedural remedy was to file a State habeas corpus petition challenging the probation revocation.

Relying on Judge Whipple's ruling, Romano filed a habeas corpus petition in the Circuit Court of Cole County, the county in which he was incarcerated. D.R. at 58-62. Cole County Circuit Judge James T. Riley, however, improperly denied Romano's petition when he held that Romano's proper procedural

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[2]After ruling that Romano's probation should be revoked, Judge Whipple was required, under Missouri law, to execute the twenty year sentence which he had originally imposed and suspended. Judge Whipple had no authority to reduce this sentence. Wagner v. Ruddy, 582 S.W.2d 692, 693-95 (Mo. en banc 1979); State v. Lynch, 670 S.W.2d 113, 114 (Mo. App. 1984); Mo. Rev. Stat. §549.101.1 (1963, as amended 1965) (repealed by L. 1977, p. 658, §1, eff. January 1, 1979).

remedy was to file a Mo. S. Ct. Rule 27.26 motion in Laclede County, Missouri. D.R. at 63.[3]

Relying on Judge Riley's opinion, Romano returned to the Laclede County, Missouri, Circuit Court and filed a Motion For Reconsideration under Mo. S. Ct. Rule 27.26. D.R. at 64-65. Judge Whipple denied Romano's motion. D.R. at 66-67. Romano's subsequent appeal to the Missouri Court of Appeals, Southern District, was dismissed on February 3, 1981. See appropriate docket sheet entries, D.R. at 54-57.

Continuing his efforts to have a court hear the merits of his claim, while at the same time feeling totally confused as how to proceed, on April 14, 1980, Romano filed a Petition For A Writ of Error Coram Nobis, challenging the constitutionality of his reckless driving conviction. The trial court refused to grant Romano's petition. Romano then perfected an appeal with the Missouri Court of Appeals, Eastern District, but on November 18, 1980, the Missouri appellate court dismissed his appeal for failure to prosecute. D.R. at 68.

After failing in his numerous efforts to obtain relief from the Missouri courts, on June 13, 1981, Romano filed, pursuant to 28 U.S.C. §2254, a petition for a writ of habeas corpus with the United States District Court for the Eastern District of Missouri. On October 2, 1981, the Honorable John F. Nangle accepted Magistrate William H. Bahn's recommendation to deny Romano's habeas petition on procedural grounds. D.R. at 72.[4]

Romano appealed the district court's ruling to the Eighth Circuit. The court dismissed Romano's claims challenging the

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[3]Petitioners concede that Judge Riley's decision was contrary to Missouri law. Pet. at 3.

[4]As to the merits of Romano's complaint, Magistrate Bahn expressed sympathy for Romano's plight when he wrote, "[i]f, indeed, the resultant twenty-year sentence was inflicted because of the charge of careless and reckless driving, it was an awesome consequence." D.R. at 71.

constitutionality of his reckless driving conviction. Romano v. Wyrick, 681 F.2d 555, 556 (8th Cir. 1982). The court held, however, that Romano could still challenge the constitutionality of his probation revocation proceeding in the Missouri Supreme Court. Id. at 556-57. The Eighth Circuit also ruled that if the Missouri Supreme Court denied relief to Romano, he could return to the federal courts under 28 U.S.C. §2254. Id.

On October 4, 1982, Romano filed a habeas corpus petition with the Missouri Supreme Court, challenging the constitutionality of his probation revocation proceeding. Missouri Supreme Court, No. 64425. On October 18, 1982, the Missouri Supreme Court denied Romano's petition without an opinion. D.R. at 79-80.

On November 4, 1982, Romano filed, pursuant to 28 U.S.C. §2254, a new habeas corpus petition with the United States District Court, Eastern District of Missouri, in which he challenged the constitutionality of his probation revocation proceeding. On December 17, 1982, while this action was still pending, Romano was placed in the custody of the Missouri Department of Probation and Parole, pursuant to Mo. Rev. Stat. §549.261(1) (1978, as amended). D.R. at 89; Romano's parole term expires in 2002. Id. On June 20, 1983, the Honorable Clyde S. Cahill granted Romano a writ of habeas corpus and ordered his unconditional release from the custody of the Missouri Department of Probation and Parole. Romano v. Black, 567 F. Supp. 882 (E.D. Mo. 1983).

Petitioners Black and Moore appealed Judge Cahill's decision to the Eighth Circuit. On May 31, 1984, the Eighth Circuit affirmed Judge Cahill's order. The court of appeals denied rehearing on June 28, 1984.

II. Facts Relating to Romano's Guilty Plea and Sentencing Hearings

The following facts which emerge from Romano's guilty plea and sentencing hearings, Tr. at 1-54, indicate that substantial evidence exists to prove that Judge Whipple abused his judicial discretion in his earliest dealings with Romano:

1. Romano pleaded guilty to the charge of transferring and selling marijuana in excess of 35 grams. Tr. at 2-3. The marijuana had a value of approximately $3,000 to $3,200. Tr. at 39.

2. Contrary to petitioners' assertion, Pet. at 9, the "heroin" involved in Romano's sale of marijuana actually consisted of a baking soda and pancake mix. Romano's Br., Addendum "A", Supplemental Pre-Sentence Investigation Report at 1. Thus, the State of Missouri only sought an indictment for Romano's transfer and sale of marijuana. Tr. at 2-3.

3. Romano pleaded guilty even though he may have had a meritorious entrapment defense as the State of Missouri had used informers to introduce Romano to various drugs prior to the State's use of informers to arrange for the actual marijuana sale for which Romano was convicted. Tr. at 9-10.

4. Romano had no prior felony convictions, Tr. at 32, and had only a very insignificant misdemeanor conviction for which he received a $50 fine with no term of imprisonment. Romano's Br., Addendum "B-1", Supplemental Pre-Sentence Investigation Report at 2. Indeed, his prior record was so clean that the "Adult Face Sheet," prepared by the Missouri Department of Social Services, indicates that Romano had no prior "prison" or "non-prison" sentences. D.R. at 78.

5. During the 28-month period between Romano's arrest and his sentencing hearing (December, 1974 to April, 1977), Romano did not commit any criminal offenses with the exception of a minor traffic ticket he received in February, 1977. Tr. at 32.

6. Judge Whipple sentenced Romano to an incredibly excessive prison term of twenty years even though the pre-sentence investigation report had recommended only five years, Romano's Br., Addendum B-2, Pre-Sentence Investigation Report at 5, and the prosecutor had recommended ten years. Tr. at 39.[5] Judge Whipple's sentence is bizarre and indicates an abuse of discretion for two reasons:

(a) The prison term is excessive on its face based on the nature of Romano's offense.[6]

(b) Suspending execution of an extraordinarily severe prison sentence and granting probation, which ostensibly indicates that Judge Whipple believed Romano could be rehabilitated within the community and did not require incarceration, reflects Judge Whipple's shocking ignorance of the policies underlying the probation system.

7. Judge Whipple's statements on the record indicate that he "harbored a disposition to send Romano to jail for any probation violation, regardless of the nature of the violation

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[5]Romano also presented substantial evidence at his sentencing hearing that his conviction did not require imprisonment. Romano's employer, Mike Atkinson, testified that Romano "does a good job . . . he's conscientious about his work and he's never been any problems (sic)." Tr. at 30. In addition, Dr. Sheldon Silk's psychological evaluation of Romano was tendered to Judge Whipple as an exhibit. Tr. at 18, 36. Dr. Silk opined that Romano was a good candidate for probation. Tr. at 36.

[6]A 1981 study of the average prison sentence for specific offense categories for defendants sentenced in the United States district courts reveals that the average sentence for a felony marijuana conviction was 47.4 months as compared with the 240-month sentence Romano received from Judge Whipple. The only offense with which Romano's sentence statistically compares is first-degree murder (251.6 months). These statistics do not differentiate between first and subsequent offenses, thus making Romano's 240-month sentence for a first felony offense even more shocking. See Romano's Br., Addendum K at 4.

and without regard to any other possible options." Romano, 735 F.2d at 323, quoting from Romano, 567 F. Supp. at 886. See also Romano, 735 F.2d at 322.

III. Facts Relating to Romano's Probation Revocation Hearing of July 18, 1977.

Judge Whipple revoked Romano's probation because he believed sufficient evidence existed to support the State of Missouri's allegations that Romano had committed the felony of leaving the scene of an accident. Tr. at 134; D.R. at 47-49. Judge Whipple's findings were based on the disputed facts relating to a car accident on June 15, 1977, in which Romano's car allegedly struck his close friend, Timothy Bradley, outside of the Stein Club in Columbia, Missouri. The probation revocation transcript, however, casts substantial doubt on Judge Whipple's factual finding that Romano was the driver of the car which struck Bradley, as well as his legal finding that Romano committed a "hit and run" felony. Judge Whipple based his findings upon circumstantial and hearsay evidence, as well as critical testimony which was inadmissible even under the liberal evidentiary standards which apply to probation revocation proceedings.[7]

Timothy Bradley, the victim of the accident, who suffered only minor injuries, testified that he could not identify the driver of the car which struck him. Tr. at 63. Gerald Saunders, an eyewitness to the accident, testified that Jody

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[7]Judge Whipple's reliance on the "material" testimony of Jody Seificas, Romano's girlfriend, who was allegedly a passenger in the car and, according to one eyewitness, possibly the car's driver, is the central legal issue involved in Romano's conditional cross-petition for a writ of certiorari which was filed contemporaneously with this opposing brief. As fully developed in Romano's cross-petition, the record reflects Judge Whipple's flagrant error in ruling that Miss Seificas' testimony could be admitted despite her persistent refusal to testify based upon her fifth amendment right against self-incrimination. This evidentiary error was so significant that it violated Romano's fourteenth amendment due process right to a fair hearing.

Seificas, Romano's girlfriend, left the car from the driver's side, Tr. at 72-73, and he thought that Seificas was the driver of the car. Tr. at 74. Saunders also stated that Terry DeHaven, a passenger in the car, told him later that Romano was driving the car. Tr. at 79. DeHaven's recollection, however, was not credible because DeHaven testified that he was drunk ("totally smashed") prior to leaving the Stein Club with Romano. Tr. at 69. DeHaven also stated that he had "passed out" in Romano's car and only awoke after the impact of the accident. Tr. at 65-66. Finally, DeHaven testified that he did not know the identity of the car's driver. Tr. at 69. In light of DeHaven's testimony, it is difficult to understand how Judge Whipple could have relied on his statement to Saunders that Romano was driving the car. See Judge Whipple's "Memorandum of Findings," D.R. at 47-49.

Larry F. Wright, a Columbia, Missouri, police officer who investigated the scene after the accident, testified that, on a street approximately six blocks from the accident, he located the car allegedly involved in the accident. Tr. at 89. Wright also stated that Jody Seificas had told him that Romano was driving the car. Tr. at 87. Seificas, however, refused to give a statement at the police station. Tr. at 88.

Seificas also repeatedly exercised her fifth amendment right against self-incrimination and refused to answer numerous questions about the accident at the revocation hearing. Tr. at 82-84. Upon being called a second time during the hearing, Seificas responded to an extremely confusing compound question about whether she had spoken with a police officer about the accident and whether she had told him that she was a passenger in the car. She later testified that she did not understand the question and, after the question was more clearly asked a second time, Seificas refused to answer, invoking her fifth

amendment privilege. Judge Whipple, however, ruled that Seificas had waived her fifth amendment privilege and also stated that he considered her testimony to be "material" in his finding that Romano was the driver of the car which struck Bradley. Tr. at 116-122; D.R. at 47-49.

Judge Whipple also relied on the testimony of members of Timothy Bradley's family who all offered almost identical testimony. Bradley's mother, father, and sister were visiting Timothy in his hospital room on Sunday morning, June 15, 1977, approximately ten hours after the accident occurred. Romano arrived to visit Bradley and, according to Bradley's mother, told Timothy, "It's too bad you jumped in front of me." Tr. at 101.[8]

The family's testimony, however, was not very credible. Both of Bradley's parents acknowledged that they had retained a local law firm to represent Timothy in a personal injury action arising out of the car accident. Tr. at 102-03, 113. Timothy Bradley offered no testimony concerning his alleged conversation with Romano about the accident. Tr. at 57-64, 102. Moreover, Greg Fallon testified that he was also in Bradley's hospital room during Romano's visit. Tr. at 124. While Fallon recalled the conversation between Bradley and Romano and was present for the entire conversation, he did not recall hearing Romano make any statements to Bradley concerning the car accident. Tr. at 125.

Judge Whipple evaluated the evidence for only three minutes, Tr. at 134, before ruling that:

1. Romano was driving the car which struck Bradley;

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[8] Mrs. Mary Ann Bradley offered this testimony verbatim. Bradley's sister and father offered almost identical testimony. Tr. at 107, 113.

2. Romano committed the felony of leaving the scene of an accident and, therefore, violated the general condition of his probation agreement in which he had agreed to obey all of the laws of the State of Missouri;[9] and

3. Romano's probation should be revoked and his underlying twenty year prison term should be executed. Tr. at 135-136; D.R. at 47-49: Judge Whipple's written findings of fact and conclusions of law.

Judge Whipple abused his discretion in making each of these three critical findings. First, Judge Whipple's finding that Romano was the driver of the car which struck Bradley is marred by Judge Whipple's erroneous consideration of the "material" testimony of Jody Seificas. Judge Whipple's decision hinged on Seificas' critical testimony. Judge Whipple, however, committed prejudicial error when he ruled that Seificas voluntarily waived her fifth amendment right against self-incrimination. See Romano's Conditional Cross-Petition for a Writ of Certiorari," No. _____, October Term, 1984, at 3-10.

Second, Judge Whipple found that Romano committed a "hit and run" felony despite the evidence which indicated that Romano lacked the requisite intent. Judge Whipple never explained how Romano, an alleged hit and run felon, would:

1. Allow all of his passengers to leave the car to attend to Bradley, notwithstanding the fact that numerous bystanders were present at the parking lot of the Stein Club who could also attend to Bradley. Tr. at 57, 85, 92; and

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[9] Romano was given three special conditions of probation which were related to his underlying marijuana conviction and required him to: (1) submit to a drug screening test on demand; (2) restrict his travel; and (3) allow a law enforcement officer to search his personal property at any time. Tr. at 49, 50. The State of Missouri never alleged that Romano violated one of these special probation conditions.

2. Visit his close friend, Bradley, at his hospital room only ten hours after the accident. (Romano was ultimately arrested in Bradley's hospital room for the alleged felony). Tr. at 115.

Romano's conduct proved that he did not intend to escape responsibilities for his actions.[10]

Third, and most importantly, Judge Whipple erred in his decision to revoke Romano's probation without considering alternatives to incarceration. The transcript reveals that Judge Whipple never discussed the reasons why the obvious alternatives to incarceration (for example, fine, restitution, drivers' training classes, or public service work) would not be more appropriate than sending Romano to jail for twenty years, especially when Romano's alleged probation violation had no rational relationship to Romano's original conviction. See Romano, 567 F. Supp. at 886-887.

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[10]The State of Missouri's prosecution of Romano for violating the hit and run statute confirms the fact that Judge Whipple lacked evidentiary support for his ruling. The State reduced the hit and run charge to careless and imprudent driving, D.R. at 52, of which Romano was ultimately convicted. D.R. at 53. Romano did not receive this reduced charge as a result of a plea bargain because the record indicates that Romano pleaded "not guilty" and vigorously defended himself against the careless and reckless driving charge. D.R. at 53.

SUMMARY OF THE ARGUMENT AND REASONS FOR DENYING THE WRIT OF CERTIORARI

The Missouri trial court revoked respondent Romano's probation for a technical violation which had no rational relationship to Romano's underlying marijuana conviction. The district court and the Eighth Circuit, therefore, correctly held that Judge Whipple abused his discretion and violated Romano's due process rights by not considering alternatives to incarceration before revoking Romano's probation and imposing an exceedingly harsh twenty year prison sentence. Numerous federal and state courts, as well as expert observers of the criminal justice system, have also endorsed the modern penological view that courts should consider alternatives to incarceration before revoking probation.

The Eighth Circuit properly applied Gagnon v. Scarpelli, 411 U.S. 778 (1973) in finding that Judge Whipple violated Romano's due process rights at his probation revocation hearing. This Court's recent decision in Bearden v. Georgia, _____ U.S. _____, 76 L.Ed.2d 221 (1983), which discussed an indigent probationer's due process rights, is factually distinguishable from Romano, and, therefore, was not discussed by the Eighth Circuit. Bearden, however, follows Gagnon in holding that courts must consider alternatives to incarceration before revoking probation. Bearden, therefore, lends additional support to Romano.

The courts below also correctly held that the State of Missouri must release Romano from all further custody. Romano's five year probation term expired in 1982. The State, therefore, no longer has jurisdiction or custody over Romano's person to conduct a retrospective probation revocation hearing which conforms with due process. Moreover, due process requires the courts to conduct a probation revocation hearing shortly

after a probation violation occurs. It would be impractical and unfair to allow the State to conduct a retrospective hearing concerning events which occurred seven and one-half years earlier.

The Eighth Circuit carefully wrote Romano to limit its precedential importance to the unique factual circumstances with which it was confronted. Rather than creating new law, the appellate court applied well-established precedents to remedy the gross injustice to which Jim Romano was subject. The Eighth Circuit's opinion, therefore, does not merit this Court's review and the petition for a writ of certiorari should be denied.

ARGUMENT AND REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE EIGHTH CIRCUIT CORRECTLY HELD THAT THE MISSOURI TRIAL COURT VIOLATED RESPONDENT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY FAILING TO CONSIDER ALTERNATIVES TO INCARCERATION.

In Gagnon v. Scarpelli, 411 U.S. 778 (1973), this Court enunciated the minimum due process standards which a state must meet if it wishes to revoke an individual's probation. These standards comprise the "process" due to all probationers by guaranteeing that the state does not arbitrarily revoke a probationer's significant liberty interest. Gagnon recognized that a court must make two fundamental determinations in deciding whether to revoke an individual's probation: (1) whether the probation terms were actually violated; and (2) if the terms of the probation were violated, "[s]hould the parolee (or probationer) be recommited to prison or should other steps be taken to protect society and improve chances of rehabilitation?" Gagnon, 411 U.S. at 784, citing Morrissey v. Brewer, 408 U.S. 471, 479-80 (1972).[11]

In exploring the rationale for requiring a trial judge to consider alternatives to incarceration, Gagnon identified various competing interests:

> Both the probationer or parolee and the State have interests in the accurate findings of fact and the informed use of discretion -- the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

411 U.S. at 785.

The Court also emphasized that rehabilitation, not punishment, is the focus of the probation/parole system.

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[11] Morrissey established the due process requirements for parole revocation proceedings and Gagnon applied these requirements to probation revocation proceedings.

> The whole thrust of the probation/parole system is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail. (emphasis added).

Id. Probation should be revoked only when the trial court is convinced that the probation violator's conduct is so bad that he or she "cannot be counted on to avoid anti-social activity." Morrissey, 408 U.S. at 479. A court must, therefore, find "significant violations of the conditions of probation" before revoking an individual's probation. Gagnon, 411 U.S. at 784, n.8 (emphasis added).

Gagnon and Morrissey also require the trial judge to consider alternatives to incarceration on the record so that the appellate court can meaningfully review the trial court's ruling. Thus, the trial judge must provide "a written statement . . . as to the evidence relied on and reasons for revoking (probation or parole)." Gagnon, 411 U.S. at 486, citing Morrissey, 408 U.S. at 489 (emphasis added).

The Eighth Circuit correctly applied the teachings of Gagnon when it held that the trial court abused its discretion and violated Romano's due process rights by failing to consider alternatives to incarceration before revoking Romano's probation. Romano, 735 F.2d at 321-24. The record supports the Eighth Circuit's ruling for three reasons. First, the transcript reveals that Judge Whipple never considered alternatives to incarceration. Romano, 735 F.2d at 323; Romano, 567 F. Supp. at 884, 886. Second, the record reflects that Judge Whipple's disposition to revoke Romano's probation for any probation violation. Id. Third, Romano's alleged probation violation -- a traffic accident that resulted in a $100.00 fine for careless driving -- had no rational relationship to Romano's underlying marijuana conviction. Moreover, as the district court observed, "the actions leading to the revocation would only have resulted in minor punishment had the defendant not

been on probation." Romano, 567 F. Supp. at 887. The Eighth Circuit, therefore, had little difficulty in finding that Judge Whipple abused his discretion in revoking Romano's probation and sending him to jail for twenty years.

II. FEDERAL AND STATE COURTS HAVE UNIFORMLY HELD THAT THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE REQUIRES TRIAL COURTS TO CONSIDER ALTERNATIVES TO INCARCERATION BEFORE REVOKING PROBATION; NO CONFLICT OF AUTHORITIES, THEREFORE, EXISTS AMONG STATE OR FEDERAL COURTS.

Numerous federal and state courts which have considered the constitutional standards for probation revocation proceedings have followed the Morrissey/Gagnon requirement that a court must consider alternatives to incarceration and other mitigating evidence before revoking probation or parole. We briefly summarize the holdings of these cases: United States v. Reed, 573 F. 2d 1020, 1024-25 (8th Cir. 1978) (before revoking probation, the court must consider whether violations are sufficiently serious to justify revocation and whether alternatives to incarceration would be more appropriate); Atkins v. Marshall, 533 F. Supp. 1324, 1329 (S.D. Ohio 1982) (in expressing its reasons for revoking probation, the trial court must consider whether reincarceration would best improve the probationer's hopes of rehabilitation); Lawrence v. Smith, 451 F. Supp. 179, 189 (W.D. N.Y. 1978) (parole board must explain its reasons for revoking parole rather than taking alternative action); Abel v. Wyrick, 574 S.W. 2d 411 (Mo. en banc 1978) (abuse of discretion as a matter of law for a court to revoke probation without considering alternatives to incarceration, especially when probation violation is technical and unrelated to underlying conviction)[12]; Commonwealth v. Vasquez, 389

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[12]Both the district court and the Eighth Circuit considered Abel to be strikingly similar to the facts at bar. This Court will note that petitioners' counsel, the Attorney General of the State of Missouri, by arguing that Judge Whipple had no duty to consider alternatives to incarceration, is taking a position which conflicts with the opinion of the Missouri Supreme Court as expressed in Abel.

A. 2d, 111, 113-14 (Pa. Super. 1978) (reversing trial court's order revoking probation and parole as it made no specific finding that, inter alia, probation-parole violation deserved imprisonment rather than alternative rehabilitative procedures); State v. Ruby, 650 P. 2d 412, 414 (Alaska App. 1982) (proof of probation violation is insufficient to revoke probation as the court must also determine whether rehabilitation of petitioner would be furthered by alternatives to imprisonment such as continuation of petitioner's probation); State v. Austin, 295 N.W. 2d 246, 250 (Minn. 1980) (court must "find that the need for confinement outweighs the policies favoring probation" before revoking probation).[13]

Petitioners suggest that United States v. Bazzano, 712 F. 2d 826 (3rd Cir. en banc), cert. denied, _____ U.S. _____, 104 S.Ct. 1004 (1983), indicates that a conflict exists among the circuits as to whether a trial court must consider

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[13]Numerous criminal law experts have endorsed the modern penological view that a trial court should consider alternatives to incarceration before revoking probation. See, e.g., ABA Standards For Criminal Justice, Standard 18-7.3(c) and (d), 2d Ed.(1980); Model Penal Code, §301.2; National Advisory Commission, Corrections, Standard 5.4; Model Sentencing And Corrections Act, §§3-304 to 3-310; D. M. Gottfredson, L. Wilkins, and P. Hoffman, Guidelines For Parole And Sentencing, (1978); M. R. Gottfredson, D. M. Gottfredson, Decision Making And Criminal Justice: Towards A Rational Exercise Of Discretion, (1980).

This Court's decisions requiring the trial judge to consider alternatives to incarceration implements several important social policies by:

1) Guaranteeing that the trial court's decision is not arbitrary but is based upon an understanding of the policies underlying the probation system and the concept of rehabilitation within the community;

2) Preserving meaningful appellate review of revocation decisions;

3) Protecting the interests of the probationer and society which are mutually dedicated to making the criminal justice system, in general, and the probation system, in particular, fair and legitimate.

See generally Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

alternatives to incarceration before revoking probation. Pet. at 19-21. Petitioners are plainly wrong as Bazzano does not even address the issue of alternatives to incarceration. Bazzano simply held that after deciding to revoke probation, the trial court need not state its reasons for imposing the original suspended sentence which it had given to the probationer after his initial conviction. 712 F.2d at 838-39. This holding follows the general rule that federal trial judges have no duty to explain the reasons underlying their sentencing decisions. The trial court's duty to consider alternatives to incarceration before revoking probation is an entirely different issue.

III. THE EIGHTH CIRCUIT'S RULING DOES NOT CONFLICT WITH BEARDEN V. GEORGIA, _____ U.S. _____, 76 L.Ed.2d 221, 103 S. Ct. 2064 (1983).14/

Bearden v. Georgia raised the question of whether a court could automatically revoke probation for an indigent's failure to pay a fine or make restitution. Five Justices held that

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14/ Petitioners have waived their argument that Bearden conflicts with Romano by not presenting their "new" interpretation of Bearden to the Eighth Circuit. See Burst v. Adolph Coors Co., 650 F. 2d 930, 932 n.1 (8th Cir. 1981) (appellate court will not consider an issue on which counsel took a contrary position in the court below).

In their appellate briefs, petitioners cited Bearden, but did not argue that it conflicted with the district court's opinion in Romano. In his appellant's brief, respondent argued that Bearden supported the district court's opinion in Romano. The Eighth Circuit panel questioned petitioners' counsel at oral argument about Bearden and thus offered the State of Missouri an opportunity to comment on the relevance of Bearden. Respondent's counsel filed a motion with the Eighth Circuit on August 31, 1984, seeking leave to hire a court reporter to transcribe these oral arguments so that this Court could evaluate petitioners' former position on Bearden. The Eighth Circuit has not ruled on respondent's motion as of the date that this brief was mailed to this Court. Petitioners also did not even cite Bearden in their "Petition for Rehearing" filed in the Eighth Circuit.

Finally, in evaluating the waiver issue, this Court should consider that sixteen of the twenty-six cases cited by the petitioners in their petition for a writ of certiorari were not cited or discussed by the district court, court of appeals, or either party in any of its briefs below.

"it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available . . . ." 76 L.Ed.2d at 230. Four Justices concurred in the result but dissented as to the trial court's duty to consider alternatives to incarceration. Id. at 234-35. Neither the majority nor the concurring opinions, however, suggested that Bearden modified this Court's prior decisions in Morrissey and Gagnon.[15]

Bearden should be limited to the unique context of indigent probationers who cannot pay their court-imposed fines or make the required restitution. Petitioner Bearden occupied the position of both an indigent and a probationer which gave him two different due process interests. The majority and concurring Justices in Bearden, however, focused on Bearden's due process interests as an indigent based upon Justice Harlan's concurring opinions in Williams v. Illinois, 399 U.S. 235, 259 (1970) and Tate v. Short, 401 U.S. 395, 401 (1971), rather than on his due process interests as a probationer under Gagnon. Bearden, 76 L.Ed.2d at 233 n.12, 235.

Petitioners suggest that Bearden limits the requirement to consider alternatives to incarceration to cases in which the probationer intentionally violated his probation. Even if one assumes that petitioners' contention is correct, Romano was still properly decided because the record indicates that Romano's alleged probation violation of striking his friend with his car in a dark parking lot was not an intentional act.

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[15] In Morrissey, Justices Brennan and Marshall concurred with the majority opinion because they felt the Court's opinion did not sufficiently expand the due process rights to which a parolee is entitled. 408 U.S. at 490-91. Justice Douglas dissented because he did not agree with the specific due process guidelines which the majority of the Court established. Id. at 491-500. This Court's decision in Gagnon was almost unanimous. Justice Douglas dissented in Gagnon solely because he contended that the due process clause required the appointment of counsel for Mr. Scarpelli. 411 U.S. at 791.

Automobile accidents are unfortunate everyday occurrences. Individuals who are involved in isolated car accidents should not be condemned as possessing antisocial personalities which threaten the welfare of society.

Justice O'Connor, however, noted that "fault" was a relevant consideration only in cases which presented facts which resembled Mr. Bearden's peculiar predicament. Bearden, 76 L.Ed.2d at 230 n.9. If it were feasible to adopt a general rule as to when alternatives to incarceration must be considered, a court would more likely focus on whether the probation violation was minor or technical[16] and whether it had any rational relationship to the underlying conviction. Thus, Romano's technical violation of careless driving, which had no relationship to his underlying marijuana conviction, triggered Bearden's requirement that the Missouri trial court had a duty to consider alternatives to incarceration before revoking Romano's probation.

This Court should find that Romano's liberty interest in his right to complete his probation term[17] directly related to the statistical probability that he would have successfully complete his probation. As Romano's success probabilities were very high, Judge Whipple was constitutionally required to make

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[16]The Annual Report Of The Director Of The Administrative Office Of The United States Courts for the years ending June 30, 1980, 1981, and 1982, defines a "minor" probation violation as "drunk[eness], disorderly [conduct], petty theft, traffic violation, etc. when sentence is 90 days or less imprisonment, or 1 year or less probation, or a fine." See Br. at A-14 to A-16 (Addendums E, F and G). Romano's careless and reckless driving conviction would certainly fall into the "minor offense" classification.

[17]Romano's due process rights were triggered by Judge Whipple's initial decision to place him on probation. "The decision to place the defendant on probation . . . reflects the determination by the sentencing court that the State's penological interests do not require imprisonment." Bearden, 76 L.Ed.2d at 221. (citations omitted).

a substantial showing that Romano's probation right could be taken away from him. Statistically, courts generally continue probations despite the probationer's commission of a minor violation. Courts have ordered revocations for minor violations in 2% or less of the cases studied.[18]

Bearden's holding that alternatives to incarceration need not be considered when an indigent intentionally fails to make restitution merely amplifies on the well-established prejudicial/harmless error rule. Chapman v. California, 386 U.S. 18 (1967); Kartmann v. Parratt, 535 F.2d 450, 454 (8th Cir. 1976). The Justices in the majority in Bearden, (and perhaps the concurring Justices as well), were concerned with the factual circumstances in which the trial court's failure to consider alternatives to incarceration amounts to underlying prejudicial error and is, therefore, reversible. Judge Whipple's decision to revoke Romano's probation without considering alternatives to incarceration should be included in the category of prejudicial error.[19]

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[18]Romano has thoroughly presented the supporting statistical authorities in his Eighth Circuit brief at 43-45; addendums D, E, F, G, H, and I at A-8 to A-23. These statistical studies include national, federal and state probation information as well as studies conducted solely in Missouri. Petitioners never challenged these statistics in their briefs filed in the Eighth Circuit.

[19]Under the prejudicial/harmless error analysis, the trial court should consider alternatives to incarceration in all probation revocation hearings. If the trial court, however, errs and fails to consider alternatives to incarceration, the appellate court can decide whether the state has met its burden of proof to show that the error was harmless beyond a reasonable doubt. The Missouri Supreme Court in Abel v. Wyrick implied that the trial court's failure to consider alternative to incarceration may be harmless if the "alleged violation was a commission of a major crime or a crime similar to that for which the probationer was originally convicted. . . ." Abel, 574 S.W.2d at 417. See also id. at 419. But under the facts of Romano, as in Abel, alternatives to incarceration were certainly appropriate and Judge Whipple, therefore, committed prejudicial error by failing to consider them before deciding to revoke Romano's probation.

IV. THE DISTRICT COURT CORRECTLY DECIDED NOT TO HOLD AN EVIDENTIARY HEARING TO ALLOW THE MISSOURI TRIAL JUDGE TO SUPPLEMENT THE RECORD AND CURE THE CONSTITUTIONAL ERRORS IN HIS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Judge Whipple filed detailed findings of fact and conclusions of law, D.R. at 66-67, as required under Gagnon. 411 U.S. at 786. "The purpose of the written statement is to allow the reviewing court to determine whether there was a factual basis for revocation. . . ." Kartmann v. Parratt, 535 F.2d 450, 457-58 (8th Cir. 1976). Judge Whipple failed to give even the slightest attention to the question of whether alternatives to incarceration was a viable sentencing option for Romano. Thus, the district court and Eighth Circuit had little difficulty in concluding that Judge Whipple erred in his revocation decision.

Petitioners argue that the district court should have held an evidentiary hearing to determine if Judge Whipple mentally considered alternatives to incarceration before revoking Romano's probation. Pet. at 31. Petitioners cannot support this incredible argument with any authority. One of the most fundamental and axiomatic principles of appellate jurisdiction is that a trial judge may not supplement an extensive record to cure errors after he has relinquished jurisdiction over the case.

V. THE DISTRICT COURT AND THE EIGHTH CIRCUIT APPLIED THE CORRECT STANDARD OF REVIEW WHEN THEY HELD THAT THE MISSOURI TRIAL COURT "ABUSED ITS DISCRETION" IN REVOKING RESPONDENT'S PROBATION.

In Burns v. United States, 287 U.S. 216, 222-23 (1932), this Court held that an appellate court must apply an "abuse of discretion" standard in reviewing probation revocation decisions. In defining "abuse of discretion," this Court stated that judicial discretion "implies conscientious judgment, not arbitrary action . . . [and] takes account of the law and the particular circumstances of the case and 'is directed by the

reason and conscious of the judge to a just result.'" Id. (citation omitted). Morrissey and Gagnon gave the "abuse of discretion" standard of review constitutional content. The courts in Romano, 735 F.2d at 321, and Abel, 574 S.W.2d at 419, for example, have held that a trial court's failure to consider alternatives to incarceration before revoking probation is a due process violation, and, therefore, an abuse of discretion as a matter of law.

Even if one assumes that Judge Whipple had no constitutional duty to consider alternatives to incarceration before revoking Romano's probation, Romano should still be affirmed. Under the standard announced in Burns, it was arbitrary for Judge Whipple to revoke Romano's probation and impose a twenty year prison term as a result of a traffic accident which had no rational relationship to his underlying criminal offense of selling marijuana. If all judges revoked probation terms for any technical probation violation, the probation system could not survive.

Petitioners contend that the federal courts below erred in not applying a more deferential standard of review to the Missouri trial court's findings. Petitioners apparently have misunderstood the plain language of 28 U.S.C. §2254(d). The federal courts have no statutory obligation to defer to Judge Whipple's findings in the case at bar for two reasons:

1) Judge Whipple made no factual findings as to the viability of alternatives to incarceration before revoking Romano's probation. 28 U.S.C. §2254(d)(1), (2), (3), (6), and (8); and,

2) The question of whether Judge Whipple should have given Romano an alternative to incarceration is a question involving Romano's due process rights, concerning which no deference need be given to the state court's finding. 28 U.S.C. §2254(d)(7).

Finally, even if one were to consider the question of alternatives to incarceration a mixed question of law and fact, this Court has held that such questions may be reviewed independently under 28 U.S.C. §2254(d)(8). Sumner v. Mata, 455 U.S. 597, (1982).

VI "THE DISTRICT COURT AND EIGHTH CIRCUIT WERE CORRECT IN ORDERING RESPONDENT RELEASED FROM ALL FURTHER CUSTODY BY THE STATE OF MISSOURI.

After finding that Romano's probation revocation hearing was unconstitutional, the district court and Eighth Circuit were correct in ordering Romano's unconditional release from all further custody. If Judge Whipple's probation revocation order was unconstitutional, and, therefore, a nullity, Romano's five year probation term, which commenced on April 13, 1977, expired on April 13, 1982. The State of Missouri no longer has jurisdiction or custody over Romano's person to conduct a new revocation hearing. The courts below were, therefore, required to order his release.

Several state courts, addressing the precise remedial issue which the court below decided, have held that a state may not hold a new probation revocation hearing to cure a procedural defect in a former hearing after an individual's probation term has already expired. People v. Amsbary, 51 Cal. App. 3d 75 (1975); Maycock v. State, 281 So. 2d 64 (Fla. App. 1973); Cook v. Commonwealth, 176 S.E.2d 815 (Va. 1970); Strickland v. Melton, 165 S.E. 2d 90 (W.Va. 1968).

While the Missouri courts have never addressed the remedial question at issue, the applicable Missouri statutes also confirm that Romano must be released from custody upon the expiration of his probation term. Mo. Rev. Stat. §549.111.1 (1963, as amended 1967) (repealed by L. 1977, p.658, eff. Jan. 1, 1979), states that when a probationer has successfully completed his probation term, "[h]e shall automatically be absolutely

discharged from the probation and from the supervision of the Board of Probation and Parole . . . ." Romano successfully completed his probation term in jail. He must, therefore, be released as provided by Missouri law.

Petitioners continue to make the incredible argument that the courts below erred by considering the five and one-half years which Romano spent in jail as a result of his unconstitutional probation revocation. Pet. at 38. The Eighth Circuit and the district court refused "to blind [themselves] to the time Romano had served in the custody of the State of Missouri." Romano, 735 F.2d at 324. Moreover, as Judge Cahill observed, "the rigors and stress associated with imprisonment are far greater than those on probation." Romano, 567 F. Supp. at 887. This Court has also observed that an individual may serve his probation term in jail. Burns v. United States, 287 U.S. 216, 223 (1932).

The record reflects that the State of Missouri never made any criminal charges against Romano while he was incarcerated. To the contrary, the evidence of Romano's conduct in jail, if adduced, would reveal Romano's exemplary record as well as the pathetic history of his mistreatment by prison guards. Romano's five and one-half year jail term should, therefore, satisfy his probation requirement.

The district court also had alternative legal grounds which justified its decision to order Romano's release. Morrissey held that "[t]he revocation hearing must be tendered within a reasonable time after the parolee is taken into custody." 408 U.S. at 488.[20] In Johnson v. Holley, 528 F. 2d 116, 119 (7th Cir. 1975), the court held that a four month delay in

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[20] This Court has found that a probationer and parolee have identical due process libery interests. Gagnon, 411 U.S. at 782 n.3.

holding a parole revocation hearing is unreasonable, if not attributable to the petitioner. The court also held that such a delay is presumptively prejudicial, and, therefore, necessitates the parolee's discharge. Id.

Romano's probation violation occurred over seven and one-half years ago. It would be impractical and unfair to allow the State of Missouri an opportunity to conduct a retrospective hearing. The trial court can only fairly consider the question of alternatives to incarceration in the context of the fresh facts and mitigating circumstances surrounding the probation violation. A gross injustice would have resulted if the courts below had allowed the Missouri trial court to consider alternatives to incarceration for Romano in a historical vacuum.

Petitioners misrepresent the record when they suggest that Romano caused the delay in holding a timely (constitutional) revocation hearing. Pet. at 38. Romano, representing himself pro se in jail, filed his first motion for relief with the Missouri courts on March 28, 1980. Thus, the Missouri court had over two years in which to cure the errors in Romano's original probation revocation. But the record reflects that Romano was bounced around for years in the Missouri courts and that all of Romano's petitions for relief fell on deaf ears. See discussion at 3-5. Petitioners' concede that one Missouri judge, Cole County Circuit Judge James T. Riley, issued an order directing Romano to file a procedurally inappropriate post-conviction relief petition. Pet. at 7. This single mistake cost Romano almost three years of his life in the Missouri penitentiaries. Unbelievably, not a single Missouri court -- at the trial, appellate, or Supreme Court levels -- even once considered the merits of Romano's case.

The decision to release Romano reflected the lower courts' sound exercise of judicial discretion in pursuit of basic fair-

ness and justice. The ancient writ of habeas corpus exists to remedy the type of wrong to which a poor and helpless Jim Romano was subject. In Iasigi v. Van De Carr, 166 U.S. 391 (1897), cited by Romano, 735 F. 2d at 324, this Court noted that the federal courts may exercise "discretion" "as law and justice require" in deciding upon a proper habeas remedy. 166 U.S. at 393, 395. The current habeas statute embodies the same policies expressed in Iasigi. 28 U.S.C. §§2243, allows a federal court broad discretion in fashioning a remedy under a writ of habeas corpus. "[T]he Court shall . . . dispose of the matter as law and justice require." 28 U.S.C. §2243. Fortunately, after five and one-half years of unconstitutional imprisonment, and another one and one-half years of unconstitutional custody on parole, the writ of habeas corpus finally brought justice to Romano.

VII. THE EIGHTH CIRCUIT COURT'S OPINION HAS LITTLE PRECEDENTIAL VALUE AND, THEREFORE, DOES NOT MERIT THIS COURT'S REVIEW.

Romano presents an extraordinarily unique set of facts. Few individuals are ever likely to share Romano's experience. Thus, the case at bar will have little precedential impact on future habeas petitioners.

The Eighth Circuit was also very careful to limit the precedential value of Romano. The court wisely noted that "determining what constitutes adequate consideration of alternatives to incarceration (requires) case-by-case analyses." Romano, 735 F.2d at 322.

Moreover, while the Eighth Circuit was fully briefed on the relevance of the Bearden case, it chose not to discuss Bearden, which, as we have shown above, is factually distinguishable and would not change the result in Romano. Even if members of this Court, however, think that Bearden conflicts with some of the Romano court's analysis, Romano, neverthe-

less, will have no precedential value vis-a-vis Bearden as Romano does not even contain a citation of Bearden.

The Eighth Circuit also carefully discussed in very general terms the propriety of the district court's remedy releasing Romano from all further custody. Romano, 735 F.2d at 324. Romano presented in his appellate brief, and at his oral argument before the Eighth Circuit, the full legal justifications supporting the district court's remedial order as discussed herein. But the Eighth Circuit decided to limit the precedential impact of Romano by not elaborating on all of the authorities which supported its decision.

Finally, this Court should consider Romano's plight within our criminal justice system. Romano has suffered enough. He has already been unfairly deprived of some of the best years of his life. Romano's horrible legal nightmare should not be protracted in the courts any longer.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals, No. 84-465, October Term, 1984.

Respectfully Submitted:

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APPENDIX A

Relevant Constitutional Provisons and Statutes:

Fourteenth Amendment of the United States Constitution:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254:

> State Custody; remedies in Federal courts
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .
>
> (b) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant

for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. §2243:

> The Court shall summarily hear and determine the facts, and dispose the matter as law and justice requires.

Mo.Rev.Stat. §549.111.1 (1963, as amended 1967) (repealed by L. 1977, p. 658, §1, eff. January 1, 1979):

> Absolute discharge of person on probation or parole -- citizenship restored -- order of discharge to indicate restoration of rights.
>
> 1. When a defendant who has been placed upon probation or parole for the term prescribed by the court, and the court granting the probation or parole is satisfied that the reformation of the defendant is complete and that he will not again violate the law, the court shall, by order of

record, grant his absolute discharge. When a defendant has completed the term of probation prescribed by the court, if the original order of probation has not been amended, modified, extended or revoked by the court, he shall automatically be absolutely discharged from the probation and from the supervision of the board of probation and parole and the court shall so note by order of record. The order operates as a complete satisfaction of the original judgment by which the fine or jail sentence or commitment to the state department of corrections was imposed or suspended.